

TESTIMONY OF
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ON BEHALF OF
LPA, THE HR POLICY ASSOCIATION
BEFORE THE
SUBCOMMITTEE ON FINANCIAL INSTITUTIONS
AND CONSUMER CREDIT
OF THE
COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES
CONCERNING
THE ROLE OF FCRA IN EMPLOYEE BACKGROUND CHECKS

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The HR Policy Association

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Mr. Chairman and Distinguished Members of the Subcommittee:

My name is Harold Morgan. I am Senior Vice President, Human Resources for Bally Total Fitness Corporation. I am pleased to appear before you today on behalf of LPA, the HR Policy Association, to discuss the critical role played by employment background screening in today's workplace and other important issues concerning the Fair Credit Reporting Act.

Bally Total Fitness Corporation is the largest and only nationwide, commercial operator of fitness centers, with approximately four million members and nearly 430 facilities located in 29 states, Canada, Asia and the Caribbean. We have approximately 23,000 employees, of whom over 5,000 are personal trainers and 1,000 are employed in our child care centers.

LPA, the HR Policy Association, is a public policy advocacy organization representing senior human resource executives of more than 200 leading employers doing business in the United States. LPA provides in-depth information, analysis, and opinion regarding current situations and emerging trends in employment policy among its member companies, policy makers, and the general public. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce.

I appreciate the opportunity to appear before you today to discuss the application of the Fair Credit Reporting Act to employment background checks and investigations of sexual harassment and other serious workplace misconduct. The Fair Credit Reporting Act applies to most employment background checks by large employers such as my company, because a consumer reporting agency is typically used to perform the screening. Yet, employment screening is an aspect of FCRA that is often overlooked, as most of the focus of the policy debate centers on credit records and other consumer financial information.

While credit records can be an important component of an employment background check, depending on whether the position involves some financial responsibilities, the reality is that the vast majority of employment background checks are more focused upon information of far greater relevance to most positions—employment history, educational background, professional credentials, and, most importantly, criminal history. It is important for Congress to be aware that all of these aspects of background screening are regulated by a statute originally intended and designed to regulate the sharing of personal financial information.

These regulations can have an enormous impact, especially in the service sector. Businesses in the service sector generally have greater turnover and, as a result hire many employees. By way of example, last year my company hired over 10,000 new employees.

Generally speaking, we urge your Subcommittee to recognize the enormous pressures and expectations imposed on today's employer with regard to seeking to ensure that individuals in their workplace do not pose a threat to their co-workers, customers, and the public at large. If any changes to FCRA are to occur, they should facilitate the ability of employers to address these needs rather than hindering it with new restrictions.

The Importance of Background Checks

Since 1996, when significant new employer obligations were added to FCRA, the priority attached to employment background checks by employers, employees and the public generally has changed dramatically. While the horrific events of September 11 have clearly played a part in this, that is not the entire story. A decade of disturbing headlines involving workplace violence, coupled with a commitment by companies to stamp out sexual and racial harassment in the workplace, had already prompted employers to exercise greater care. Meanwhile, soon after September 11, a wave of corporate scandals, where the misdeeds of a few key employees brought corporate giants to their knees, demonstrated the need to exercise this caution at all levels of the corporate domain.

In my own company, we have several employee groups where caution must be "exercised" (so to speak) from a screening and hiring perspective. In the nature of their work, our personal trainers have a certain amount of physical contact with their clients as well as having access to our locker rooms. We certainly need to avoid hiring anyone that may have a tendency toward violence, sex offenses or other actions that would pose a serious threat to their co-workers or our customers. In addition, our supervisors have considerable access to personal client information that must be accorded the utmost confidentiality. Finally, the sensitivities regarding our child care attendants go without saying. Clearly, all of these employees need to be thoroughly screened.

Employers conduct background checks on potential and current employees in order to screen out candidates who pose a greater-than-average threat to the safety and security of the workplace. Examples of why background checks are necessary, unfortunately, are not hard to find. Indeed, the newspapers are full of stories detailing workplace violence, fraud, sexual and racial harassment, or other problems that may have been avoided with a background investigation. In the last few years, several episodes of workplace violence have highlighted this issue. Meanwhile, the Occupational Safety and Health Administration (OSHA) reports that homicide was the second leading cause of occupational fatalities in 2001.¹

Examples of why screening can be a critical part of maintaining a safe work environment, unfortunately, are not hard to come by. In one recent case, a maintenance employee in an apartment building, strangled a 20-year-old mother. As part of his work, the maintenance employee had access to the keys for all the apartments and he used those keys to unlawfully enter the victim's residence. Had the apartment complex run a background check, it would have discovered he had previously been convicted of rape, armed robbery, burglary, robbery by force, and credit card fraud and that there was an outstanding warrant for his arrest.²

Another area where background checks can be a useful tool is in the prevention of identity theft, which has been a major focus of the FCRA hearings this year. An example of how a background check can help curb identity theft is provided by an incident involving First Interstate Bank prior to its acquisition. In 1994, First Interstate permitted an individual to work for three months in its Visa credit-card-collections division before terminating him after a background check revealed he had been convicted of grand theft in California in 1981.³ During those three months, however, the employee used a

customer's confidential information to obtain credit cards and take out high-interest-rate loans, accumulating a total of \$50,000 in debt.⁴ The customer in turn, sued the First Interstate for \$150,000.⁵

A similar identity theft case shows the importance of a *thorough* background check. An individual who was convicted in 1996 of two felony counts related to identity theft in Ohio reused the identity he had stolen in that case to apply for the position to oversee pension funds with the state Public Employee Retirement Fund.⁶ The state had run a limited background check that did not reveal the false identity or convictions.⁷ After a tip, however, a newspaper engaged in a more thorough background investigation and discovered his real identity and criminal past.⁸ Not surprisingly, after the incident, the Governor called for a review of the state's background check procedures.⁹

Thus, it is not surprising that the public not only supports—but also in many cases *expects*—employers to conduct criminal background checks. Indeed, according to a 2002 Harris poll conducted for Privacy & American Business, the vast majority of employees found investigations into a job candidate's work history (92 percent) and/or criminal convictions (91 percent) acceptable, and a majority believe that employers should be able to examine arrest records without convictions.¹⁰ The poll also found that 53 percent of employees *want* their employers to conduct more detailed background checks.¹¹

Meanwhile, in response to this heightened public concern, the government increasingly requires that certain employers conduct background checks. For example, in sensitive industries—day care, transportation, ports, security, financial services and nuclear power—the government either has instituted or is seriously considering mandated background checks. Most recently, under proposed rules currently pending before EPA, contractors performing work for EPA on federally-owned, leased or occupied facilities would be required to conduct background checks and make suitability determinations regarding employees working at those facilities.¹² In addition, in an action required by the USA PATRIOT ACT, the Transportation Security Administration and DOT have issued interim regulations, effective immediately, requiring background checks for holders of commercial drivers licenses with a hazardous materials endorsement.¹³

This list is likely to grow as several Members of Congress on both sides of the aisle have introduced numerous bills that would require employers in specific industries to perform background checks for certain occupations. A partial listing includes: H.R. 18, by Rep. Judy Biggert (R-IL), requiring background checks for employees of certain Medicare providers; H.R. 439, by Rep. Rob Andrews (D-NJ), requiring that businesses “that send employees into people's homes” perform background checks on those employees; H.R. 364, by Rep. Darlene Hooley (D-OR), requiring background checks on drivers providing Medicaid medical assistance transportation services; and S. 350, by Sen. Hillary Clinton (D-NY), requiring background checks on employees who handle radioactive materials.

In some instances, the government does not explicitly require background checks, but encourages them by permitting “negligent hiring” suits against employers that fail to conduct adequate checks. Under a negligent hiring claim, a plaintiff may recover against an employer for injuries caused by an employee whom the employer would not have hired had it conducted an adequate background check.

LPA Background Check Protocol

As the importance of employment background screening has grown, we also recognize the need for employers to maintain the confidentiality and ensure the accuracy of the highly sensitive and private information about prospective and current employees gained through background checks and employee investigations. Employers are responsive to this need and take the utmost care in developing and implementing practices that maintain confidentiality and accuracy of information gathered from background checks and investigations.

A description of how LPA member companies approach this sensitive area is provided by the *LPA Background Check Protocol*. The Protocol was authored by the LPA Workplace Security Advisory Board, which is composed of the top security officials of LPA member companies. The Protocol articulates the best practices of companies that have had considerable experience with background checks and illustrates the complexity of the issues in this area. Those issues—which involve matching the unique characteristics of the applicant or employee with the distinctive components of the job in question—do not lend themselves to black letter prescriptions. Thus, the Protocol, like voluntary guidelines, acts as an effective guidepost for employers without imposing rigid, inflexible and ineffective restrictions.

Application of FCRA to Employment Background Checks

Employment background checks are regulated by the Fair Credit Reporting Act whenever the employer uses a consumer reporting agency (CRA) to collect the information. Because few large employers have the resources to conduct their own background checks, it is quite common to use CRAs to ensure a thorough and accurate search. Regulation by FCRA has two implications for an employer: 1) procedural requirements pertaining to the initiation of the background check and use of the information gathered; and 2) limits on the reporting of information by the CRA to the employer.

Procedural Requirements. In terms of procedural requirements, the employer must:

- notify and obtain consent from the employee or applicant before initiating a covered background check;¹⁴
- before receiving the background check, certify to the CRA that it has provided notice and received consent and will provide a copy of the background check and description of FCRA rights before taking adverse action;¹⁵
- before taking an adverse employment action (*i.e.*, termination, demotion, etc.) based on the background check, provide the applicant or employee with a copy of the background check and a summary of his or her rights under FCRA (this will be provided by the CRA);¹⁶ and
- after taking an adverse action, provide the individual with an “adverse action notice.” The notice may be provided orally, in writing, or electronically, but must include:

- the name, address, and phone number of the CRA (including any toll-free telephone number established by a national CRA) that supplied the background check;
- a statement that the CRA did not make the decision to take the adverse action and cannot give specific reasons for it; and
- a notice of the individual’s right to dispute the accuracy or completeness of any information the CRA furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days;¹⁷
- if the individual disputes the accuracy or completeness of the information in his or her file, the CRA shall reinvestigate the matter free of charge and record the status of the disputed information within 30 days.¹⁸

As far as background checks are concerned—as opposed to workplace misconduct investigations which we will discuss later—we are not aware of any problems LPA member companies have had in complying with these procedural requirements. Because of the critical nature of employment background checks described at the outset, we would strongly caution against imposing any further restrictions that would only impede the process of obtaining essential information in a timely manner.

Limits on Information. The second major limitation of FCRA on employment background checks pertains to the information that may be provided to the employer. FCRA provides that covered background check reports for employees or applicants expected to earn less than \$75,000 a year may not contain information regarding arrest records, civil suits or judgments, or other adverse information that predates the report by more than seven years or the applicable statute of limitations—whichever is longer.¹⁹ Conviction records are excluded from this prohibition.

The seven-year time frame is a product of the statute’s primary focus upon personal financial information, where seven years is a very long period of time. We would ask whether it makes sense to apply the same time frame to criminal records. Most employers are going to discount an arrest without a conviction that is more than seven years old anyway, but this may not always be the case. If a position involves contact with children and the applicant was arrested more than seven years previously for child molestation, even if it was beyond the statute of limitations, shouldn’t the employer at least have that information to make an informed decision? In these instances, the employer could allow the applicant to demonstrate that he or she was exonerated on the basis of the facts and not some procedural technicality.

If your Subcommittee wishes to support the ability of employers to conduct background checks in order to enhance workplace security, we believe the seven-year limit on all non-financial information—or at the very least criminal histories—should be removed or at least extended.

Proliferation of State Laws Inhibiting Access to Criminal Records

While the seven-year limit on adverse information in FCRA poses some obstacles to a thorough background check, this is not nearly as serious as a recent trend among states laws posing even greater restrictions. Several states completely prohibit or severely limit an employer's access to arrest and conviction information. Most of these prohibitions are contained in state discrimination laws, although some are part of state credit reporting laws (*i.e.*, state versions of FCRA).

State Discrimination Laws. The prohibitions pursuant to state discrimination laws are a derivative of several federal courts rulings that using arrest or conviction records as an *absolute* bar to employment may, in certain circumstances, have a disproportionate or “disparate” impact on select minorities and therefore violate Title VII of the Civil Rights Act of 1964 (Title VII) unless the employer can show that such action is “job related.”²⁰

Unfortunately, many states are using the logic behind these decisions to prohibit employers from ever *inquiring* about a candidate's arrest record—even where there is no evidence that the employer's inquiry will lead to unlawful employment discrimination.²¹ Some states take it a step further by limiting an employer's ability to inquire into *convictions*—again, even where there is no evidence that the inquiry will lead to unlawful discrimination.

Yet, even the Equal Employment Opportunity Commission (EEOC) has acknowledged that arrest records may provide information important to the employee selection process.²² In a guidance document, the Commission provided examples where information gained from an arrest record would justify refusing to hire a candidate.²³ In one of the examples, the Commission said a company would be justified for refusing to hire someone as a bus driver if the person had been arrested two years ago for driving while intoxicated, but was acquitted on procedural grounds.²⁴ Similarly, the Commission found it acceptable for a school to refuse to hire as a teacher a candidate who was arrested for statutory rape of a student while working at another school, even though charges were dropped because it was discovered the student had just turned 18.²⁵

A recent case involving a high school here in Washington, D.C. illustrates the potential danger of ignoring an arrest record for a sensitive position. A former Ballou High School counselor has been charged with forcing a Ballou student to have sex with him more than 10 times over a two-year period. A police affidavit alleges that the counselor told the student he would change her grades or fail her if she refused to have sex with him. According to court records, the same individual was charged in 1996 with raping a 15-year-old girl in August 1992. The case was tried in D.C. Superior Court in March 1997 and ended in a hung jury with no retrial.

School officials point out that, because there was no conviction, D.C. regulations prohibited them from taking the earlier criminal case into account when the individual applied to be a school attendance counselor in 1999. It is worth noting that the same individual received probation in 1988 for two charges of attempted drug possession. School officials indicate, even for a school counselor, that information also could not have been used to bar him from employment with D.C. schools because drug convictions more than 10 years old or that involve only marijuana do not preclude employment.²⁶

These examples show that arrest records can reveal important information. Indeed, just because a prosecutor could not prove *beyond a reasonable doubt* that the alleged violation occurred does not definitely resolve whether some misconduct did not occur, particularly in light of limitations on evidence in criminal trials. In fact, even in the context of arrest records, the EEOC has specifically rejected the notion that federal discrimination law requires an employer to apply the *beyond a reasonable doubt* standard in order to base an employment decision on an candidate's arrest record. In guidance, it has noted that the employer may use an arrest record as a basis of an employment decision without conducting "an informal 'trial' or extensive investigation to determine an applicant's or employee's guilt or innocence."²⁷

Nevertheless, many state equal employment opportunity laws prohibit employers from seeking information on arrest records. Indeed, at least 11 states have statutes explicitly prohibiting arrest records inquiries,²⁸ and as many as 12 states have issued administrative guidance declaring the inquiries unlawful.²⁹ Other states only permit arrest inquiries if the employer shows business necessity.³⁰

Some states even limit inquiries into conviction records, such as Alaska, the District of Columbia (as noted), and Ohio, which prohibit inquiries into certain convictions more than 10 years old.³¹ Other states impose different limitations. For example, Hawaii only permits inquiries into convictions for candidates who have been extended a conditional offer of employment.³² California prohibits requests into marijuana convictions over two years old.³³ Similarly, Massachusetts prohibits inquiries into certain first-time convictions—including misdemeanor drunkenness, simple assault, and speeding.³⁴ Some states only allow inquiring into convictions when the employer proves it is job related.³⁵

State Credit Reporting Laws and Other Laws. Several states impose limitations on consideration of criminal records through their own credit reporting laws. The state laws, unfortunately, often impose different obligations than FCRA, thus creating a patchwork of requirements employers must navigate to conduct a nationwide background check.³⁶

For example, in California, Montana, Nevada, and New Mexico, a reporting agency may not report arrests or *convictions* more than seven years old.³⁷ California, New Mexico, and New York prohibit a reporting agency from reporting any arrest that does not result in a conviction.³⁸ Other states, such as Kansas, Maryland, Massachusetts, and New Hampshire,³⁹ prohibit consumer reporting agencies from reporting on arrests or *convictions* more than seven years old if the employee or applicant is expected to earn less than \$20,000 a year. New York and Texas have similar laws but set the salary level at \$25,000 and \$75,000, respectively.⁴⁰

If your Subcommittee wishes to support the ability of employers to conduct background checks in order to enhance workplace safety, we believe you should consider a safe harbor against prosecution under state law limitations on criminal information for employers who have complied with the terms of FCRA.

Inadequacy of Existing Databases

Even where an employer to is allowed to consider criminal data, there is the problem of access to such data. While FCRA itself cannot correct this problem, any discussion of the impact of FCRA on background checks would not be complete without at least noting

the problem. While workers in certain industries, such as those employed at nuclear plants or in U.S. ports, are subject to national and international background checks run through the Justice Department—employers in most industries do not have access to federal databases and must run nationwide background checks by accessing each state database either through their own resources or through a consumer reporting agency.⁴¹

The federal government maintains various databases with criminal history information, the most comprehensive of which is the National Crime Information Center (NCIC), which is maintained by the FBI. Yet, access to these databases is limited to law enforcement and certain other governmental personnel, even though to a large extent the data in the databases is a matter of public record. Congress has enacted laws permitting some employer access to criminal history records through the FBI or state agencies but this access is narrowly limited to certain occupations.

Thus, for the vast majority of positions, employers and the consumer reporting agencies they use are left with a jurisdiction-by-jurisdiction search, which is not always sufficient. For example, in a recent case in Virginia, a former employee of the Williams School, was convicted of videotaping nude boys from the school.⁴² The school only ran a background check in Virginia which, of course, failed to turn up a previous conviction for child molestation in North Carolina.

While we recognize that any changes in access to federal criminal databases is outside the jurisdiction of your committee, we would encourage Congress to look into this problem. Since FCRA encompasses information about criminal records, it would certainly be relevant as part of any new legislation amending FCRA to authorize a study of the effects of the current prohibition against employers accessing these records for employment purposes.

Application of FCRA to Sexual Harassment and Other Workplace Misconduct Investigations

Your Subcommittee's consideration of the reauthorization of FCRA provides an opportunity to address a serious misinterpretation of the statute by the Federal Trade Commission with regard to certain workplace misconduct investigations. In 1999, the FTC issued an opinion letter, known as the Vail letter, which states that if an employer uses experienced outside investigators, such as private investigators, consultants, or law firms, to investigate workplace misconduct, the investigators are considered "consumer reporting agencies" (CRAs) under FCRA and, therefore must comply with that Act's notice, disclosures and other requirements.⁴³

Unfortunately, an investigator cannot possibly conduct an effective investigation into many forms of serious workplace misconduct while also complying with these requirements. For example, as is illustrated in a case we describe below, a board of directors cannot effectively investigate its CEO and other high-level executives for "cooking the books" if it must first inform and obtain consent from the subjects of the investigation. Nor could an employer conduct an effective investigation into sexual or racial harassment if witnesses knew that the employer would have to readily reveal to the accused a report in which he or she could easily identify those witnesses.⁴⁴

Thus, the FTC interpretation effectively deters employers from using *outside* organizations to conduct investigations. Yet state and federal laws strongly encourage employers to use experienced and objective third parties to investigate suspected workplace misconduct, such as workplace violence, fraud, employment discrimination and harassment, securities violations, and theft. Moreover, in many cases an employer may need to use an outside investigator because the technical nature of the alleged misconduct requires an expert investigator or the investigation is of a high-level official and outside objectivity is needed. In other cases, the employer may simply lack the resources to conduct an in-house investigation.

Even the FTC has acknowledged the problem caused by the Vail letter.⁴⁵ Nevertheless, the Commission has refused to rescind the Vail letter, claiming again in its testimony earlier this month that it is a correct interpretation of the statute and that Congress must amend FCRA in order to fix the problem. Indeed, the Commission has maintained this position despite change in leadership and in the face of overwhelming criticism of the legal reasoning behind the Vail letter, particularly with respect to Congressional intent and legislative history.⁴⁶

The few courts that have addressed the issue have neither embraced nor squarely rejected the Vail letter. While most have expressed doubt over the validity of the Vail letter interpretation, they have nonetheless disposed of the case on technical issues not directly related to the FTC's interpretation.

In one noteworthy case where this issue has yet to be resolved, *Rugg v. Hanac*,⁴⁷ the company hired a consulting firm to investigate possible problems with its finances after the city of New York expressed concern following an audit. Soon thereafter, the board of directors discharged the company's executive director. Relying on the Vail letter, the executive director sued the company for failing to follow FCRA's notice and disclosure requirements. Although the court expressed reservations about the validity of the Vail letter interpretation, it nonetheless denied the employer's motion to dismiss and ordered more discovery on the issue of whether the consulting firm regularly conducted such investigations, and therefore is a CRA within the meaning of the statute.⁴⁸

Bipartisan legislation has been introduced—H.R. 1543, the Civil Rights and Employee Investigation Clarification Act, by Reps. Pete Sessions (R-TX) and Sheila Jackson-Lee (D-TX)—which would exempt workplace misconduct investigations from FCRA as long as certain conditions are met. H.R. 1543 would amend FCRA to exclude from the definition of a “consumer report investigation” an investigation concerning: (1) suspected misconduct relating to employment, or (2) compliance with the law, the rules of a self-regulatory organization, or any pre-existing written policies of the employer. The exemption would not include investigations of an employee's credit, and the results of the investigation could only be given to the employer or its agent, a government official, a self-regulatory organization, or as otherwise required by law. For the exemption to apply, after taking any adverse action based on information in the investigative report, the employer would be required to provide to the employee a summary of the report containing the nature and substance of the investigation, but not the sources of the information. The effect of this exclusion is that employers would not need to get consent from an employee *before* conducting an investigation or disclose the

details of the investigation, the two major impediments FCRA imposes on workplace misconduct investigations.

While we would prefer legislation that would exclude altogether from FCRA workplace misconduct investigations that do not involve a CRA background check, H.R. 1543 represents a workable solution and we commend Reps. Sessions and Jackson-Lee for their leadership on this issue. We urge you to include this measure as part of any FCRA amendments enacted in this Congress, if not as a separate bill.

Conclusion

In sum, the reauthorization of FCRA occurs at a time when employers are under considerable pressure from their stakeholders to provide a secure workplace. We urge that any action you take, if anything, help employers address those critical needs. We have made several suggestions in this testimony for improvements to FCRA and we look forward to working with you. Thank you for the opportunity to present our views.

Endnotes

¹ 2001 Census of Fatal Occupational Injuries Data, retrieved from

<http://www.bls.gov/iif/oshcfoi1.htm#2001>.

² Janet L. Conley, *\$13.4 Million Damages Awarded in Gwinnett Apartment Slaying*, *Fulton County Daily Report*, Vol. 113, No. 157 (Aug. 14, 2002).

³ Rob Eure, *Bank Is Sued Over Theft Of Private Data*, *Wall Street Journal* (Sept. 8, 1999).

⁴ *Id.*

⁵ *Id.*

⁶ *Ex-Indiana pension chief hid conviction; Benefit officer served time for identity theft*, *The Courier-Journal*, (Aug. 16 2002).

⁷ *Id.*

⁸⁸ *Id.*

⁹ *Id.*

¹⁰ Harris Interactive, *Privacy and Security: The Mind and Mood of U.S. Employees and Managers* 34, 81 (May 14, 2002); *see also* Alan Westin, *Biometrics and Privacy in the Private Sector: An In-Depth Report*, *Privacy & American Business*, Vol. 9, No. 8 at 7, 8 (Dec. 2002) (76 percent of those polled found it acceptable for employers to check biometrics of a job applicant against a government database of convicted felons and 90 percent found it acceptable for the government to check applicants for licenses as teachers, private guards, or nursing home workers against a biometric database of criminal offenders).

¹¹ Harris Interactive at 36 & 83.

¹² Acquisition Regulation: Background Checks for Environmental Protection Agency Contractors Performing Services On-Site, 68 Fed. Reg. 2988 (2003).

¹³ Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License, 68 Fed. Reg. 23852 (2003) (codified at 49 C.F.R. Parts 1570 and 1572).

¹⁴ 15 U.S.C. § 1681b(b)(2).

¹⁵ *Id.* § 1681b(b)(1).

¹⁶ *Id.* § 1681b(b)(3).

¹⁷ *Id.* § 1681m(a).

¹⁸ *Id.* § 1681i.

¹⁹ *Id.* § 1681c(a) & (b).

²⁰ 42 U.S.C. § 2000e *et seq.*; *see Equal Employment Opportunity Commission Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII* (1990) (citing several cases supporting this proposition).

²¹ Strangely enough, guidance issued by the Equal Employment Opportunity Commission appears to condone a state ban on inquiries, even though it readily admits arrest information can be pertinent to the job selection process. *See Equal Employment Opportunity Commission Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII* 5-6 & 9 (1990); *see also Equal Employment Opportunity Commission, Theories of Discrimination Appendix 604-A* at 3 (stating that an absolute bar to employment on the basis of conviction records is only unlawful “where there is evidence of adverse impact”).

²² *Id.*

²³ *See generally id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Counselor Faces Sex Charge*, *Wash. Post*, June 5, 2003, at B-2.

²⁷ *Id.* at 9.

²⁸ Those states are: Alaska (Alaska Stat. § 12.62.160(b)(8)); Arkansas (Ark. Code Ann. § 12-12-1009(c)); California (Cal. Lab. Code § 432.7(a)); Illinois (Ill. Comp. Stat. 5/2-103(A)); Massachusetts (Mass. Gen. Laws ch. 151B § 4(9)(ii)); Michigan—but for misdemeanor offenses only (Mich. Camp. Laws § 37.2205a(1)); Mississippi (Miss. Code Ann. § 45-27-12(a)(b)); Nebraska—if the arrest is more than a year old (Neb. Rev. Stat. § 29-3523(1)); New York (N.Y. Exec. Law § 296(16)); North Dakota (N.D. Cent. Code § 12-60-16.6); and Rhode Island (R.I. Gen. Laws § 28-5-7(7)).

²⁹ Those states are: Arizona (Arizona Civil Rights Division’s Pre-Employment Guide); Colorado (Colorado Civil Rights Commission guidelines on pre-employment inquiries); Kansas (Kansas Human Rights

Commission's Guidance on Equal Employment Practices); Michigan (Michigan Civil Rights Commission Pre-Employment Inquiry Guide); Nevada (Nevada Pre-Employment Inquiry Guide); New Hampshire (New Hampshire Commission for Human Rights guidelines); New Jersey (New Jersey Guide to Pre-employment Inquiries); Ohio (Ohio Civil Rights Commission's "A Guide for Application Forms and Interviews"); Rhode Island (Rhode Island Commission for Human Rights guidelines); South Dakota (South Dakota Division of Human Rights Pre-employment Inquiry Guide); Utah (Utah Industrial Commission, Anti-Discrimination Division Pre-employment Inquiry Guide); and West Virginia (West Virginia Bureau of Employment Programs Guidelines for Pre-Employment Inquiries").

³⁰ Those states are: Idaho (Human Rights Commission Pre-employment Inquiry Guide) and Missouri (Missouri Guide to Pre-employment Inquiries).

³¹ Alaska (Alaska Admin. Code tit. 13 § 68.310(b)(3)); (District of Columbia Code Ann. § 2-1402.66; Hawaii (Hawaii Civil Rights Commission Guideline for Pre-Employment Inquiries); and Ohio (Ohio Civil Rights Commission's "A Guide for Application Forms and Interviews").

³² Haw. Rev. Stat. § 378-2.5(a)-(b).

³³ Cal. Lab. Code § 432.8.

³⁴ Mass. Gen. Laws ch. 151B § 4(9)(ii).

³⁵ Those states are: Missouri (Missouri Guide to Pre-employment Inquiries); New Hampshire (New Hampshire Commission for Human Rights guidelines); New Jersey (New Jersey Guide to Pre-employment Inquiries); Rhode Island (Rhode Island Commission for Human Rights guidelines); South Dakota (South Dakota Division of Human Rights Pre-employment Inquiry Guide); and Utah (Utah Industrial Commission, Anti-Discrimination Division Pre-employment Inquiry Guide).

³⁶ Some state laws complicate matters further by imposing different notice disclosure requirements than those in FCRA. For example, California, Illinois, Minnesota, and Oklahoma require employers to furnish employees with a copy of the report regardless of whether any action is taken based on the report. Cal. Civ. Code § 1786.20(a)(2) (California); 20 Ill. Comp. Stat. Ann. 2635/7(A)(1) (Illinois); Minn. Stat. § 13C.03 (Minnesota); Okla. Stat. tit. 24, § 148 (Oklahoma).

³⁷ Cal. Civ. Code § 1786.18(a)(7) (California); Mont. Code Ann. § 31-3-112(5) (Montana); Nev. Rev. Stat. 5698C.150(2) (Nevada); N.M. Stat. Ann. § 56-3-6(a)(5) (New Mexico—note there the state imposes a complete bar on reporting of arrest records).

³⁸ Cal. Civ. Code § 1786.18(a)(7) (California); N.M. Stat. Ann. § 56-3-6(a)(5) (New Mexico); N.Y. Bus. Law § 380-j(a)(1) (New York).

³⁹ Kan. Stat. Ann. §§ 50-704(a)(5) & (b) (Kansas); Md. Code Ann. §§ 14-1203(a)(5) & (b)(3) (Maryland); Mass. Gen. Laws 93 §§ 52(a)5 & (b)(3) (Massachusetts); N.H. Rev. Stat. Ann. §§ 359-B:5(I)(e) & 5(II)(c) (New Hampshire).

⁴⁰ N.Y. Gen. Laws §§ 380-j(f)(1)(v) & (j)(f)(2)(iii) (New York); Tex. Bus. & Com. Code Ann. §§ 20.05(a)(4) & (b)(3) (Texas).

⁴¹ While the FBI database is a nationwide government database, it still relies on information provided by the states. According to certain Members of Congress, this information is not always as comprehensive as it could be. In the 107th Congress, legislation (H.R. 4757) was introduced to improve the flow and quality of the information for the database that states provide to the FBI.

⁴² Tim McGlone, *Federal Judge Adds Some More Years to Convicted Pedophile's Prison Term*, Virginia-Pilot and Ledger-Star (May 17, 2002).

⁴³ While the Vail letter only addresses whether FCRA applies to sexual harassment investigations, a subsequent FTC opinion letter states that the FCRA applies to any investigation of employee misconduct. See August 31, 1999, letter from David Medine, Federal Trade Commission Associate Director, Division of Financial Practices, to Susan Meisinger; see also March 31, 2000, letter from Robert Pitofsky, Federal Trade Commission Chair, to Congressman Pete Sessions; Statement of Federal Trade Commission before the House Banking and Financial Services Committee, May 4, 2000.

⁴⁴ See *infra* note 147.

⁴⁵ Statement of Federal Trade Commission Before the House Banking and Financial Services Committee Subcommittee on Financial Institutions and Consumer Credit (May 4, 2000).

⁴⁶ See generally testimony concerning employer investigation into employer misconduct before the House Banking and Financial Services Committee Subcommittee on Financial Institutions and Consumer Credit (May 4, 2000); see also, e.g., Amanda Fuchs, *The Absurdity of the FTC's Interpretation of the Fair Credit Reporting Act's Application to Workplace Investigations: Why Courts Should Look Instead to Legislative*

History, 96 Nw. U. L. Rev. 339 (2001); Theresa Butler, *The FCRA and Workplace Investigations*, 15 Lab. Law. 391 (2000); Meredith Fried, *Helping Employers Help Themselves: Resolving the Conflict Between the Fair Credit Reporting Act and Title VII*, 69 Fordam L. Rev. 209 (2000); and Kim S. Ruark, Comment, *Damned if You Do, Damned if You Don't?*, 17 Ga. St. U.L. Rev. 575 (2000).

⁴⁷ 2002 WL 31132883 (S.D.N.Y. 2002).

⁴⁸ *Id.* at 2-3; see also *McIntyre v. Main Street & Main Inc.*, 2000 US Dist. Lexis 19617 (N.D. Cal. 2000) (holding that plaintiff had not shown outside counsel's investigation into sexual harassment violated FCRA because it had not shown counsel regularly conducted such investigations).